STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323412 Macomb Circuit Court
JOHNNIE DEREK ROGERS, Defendant-Appellant.	LC No. 2013-002050-FH

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of reckless driving causing death, MCL 257.626(4), and operating a vehicle while intoxicated causing death, MCL 257.625(4). We affirm, but remand for further sentencing proceedings consistent with this opinion.

Defendant first argues that he was denied his right to a speedy trial. We disagree. The question whether a defendant was denied the right to a speedy trial is a mixed question of law and fact. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The trial court's findings of fact are reviewed for clear error, while the question whether the defendant's constitutional right was violated is reviewed de novo. *Id.*

Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. Whether a defendant has been denied the right to a speedy trial depends on the balancing of four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). The time for judging whether a defendant's constitutional right to a speedy trial has been violated runs from the date of the defendant's arrest. *Id.* at 261. After a delay of 18 months, prejudice is presumed and the burden shifts to the prosecutor to show that the delay did not result in prejudice. *Id.* at 262. It is only after a presumptively prejudicial delay of 18 months that the other factors must be considered to determine whether the defendant's right to a speedy trial was violated. *Id.*

Defendant was arrested on March 25, 2013. His trial commenced approximately 15 months later, on June 17, 2014. Because the delay in bringing defendant to trial was less than 18 months, prejudice is not presumed. See *Williams*, 475 Mich at 262. Defendant asserts that he was prejudiced by the delay because he was unable to locate witnesses Tia Powell and Shawn

Walker, and was unable to assist defense counsel in pretrial investigation and preparation. Defendant fails to explain how any delay contributed to his inability to locate the witnesses or how testimony from these witnesses would have helped his case. Furthermore, defendant's vague assertion that the delay prevented him from assisting defense counsel in pretrial preparation and investigation is not sufficient to demonstrate prejudice. Therefore, defendant has not shown that he was prejudiced by the 15-month delay in bringing him to trial. And because the delay was less than 18 months, this Court need not inquire into the other factors set forth in *Barker.* See *Barker*, 407 US at 530; *Williams*, 475 Mich at 262. Accordingly, defendant has failed to establish that he was denied his right to a speedy trial.

Defendant next argues that prosecutorial misconduct denied him a fair trial. We disagree. An unpreserved claim of prosecutorial misconduct is reviewed for plain error that affected the defendant's substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

Defendant first contends that the prosecutor committed misconduct by repeatedly asking him during cross-examination whether the witnesses that testified against him were lying or "had it out for him." Defendant argues that these remarks were inflammatory and denied him a fair trial. While we agree that it was improper for the prosecutor to ask defendant to comment on the credibility of other witnesses, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), we find no plain error that affected defendant's substantial rights. Defendant dealt well with the questions and the jurors were instructed that it was their responsibility to determine the credibility of the witnesses. Under these circumstances, and given the weight of the evidence against defendant, we find no error warranting appellate relief.

Defendant next asserts that the prosecutor improperly shifted the burden of proof when he repeatedly asked defendant why he had not offered medical records to prove his claimed diabetic condition. It is improper for a prosecutor to imply that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463; 793 NW2d 712 (2010). Furthermore, a prosecutor may not comment on the defendant's failure to present evidence because such a comment is an attempt to shift the burden of proof. *Id.* However, "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Having reviewed the record, we conclude that the prosecutor's questions did not shift to defendant the burden of proving his innocence. Instead, the prosecutor merely attacked the credibility of defendant's theory that he was not intoxicated but was suffering from diabetic ketoacidosis. Furthermore, the prosecutor acknowledged during his rebuttal argument that he had the burden of proving defendant's guilt, and the jury was instructed that "[t]he defendant is not required to prove his innocence or do anything." Moreover, because a curative instruction could have alleviated any prejudicial effect of improper comments, reversal is not warranted. See *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010).

Defendant also argues that the prosecutor committed misconduct when he accused defense counsel of being "slick" and engaging in a "smoke and mirrors" routine. While a prosecutor is not permitted to personally attack defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), the prosecutor here did not refer to defense counsel

personally as "slick." Rather, the term "slick" referred to defense counsel's closing argument, during which counsel blamed the police for purportedly failing to conduct a complete investigation in an attempt to divert attention from the evidence of defendant's guilt. In addition, the prosecutor's reference to the defense as "smoke and mirrors" was merely a comment on the evidence and argument presented by defendant. See *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002) (concluding that the prosecutor's comment that the defense was "smoke and mirrors" was not improper and did not deny the defendant a fair trial). When reviewed in context, the prosecutor's remarks do not constitute plain error that affected defendant's substantial rights.

Defendant next argues that defense counsel's failure to object to the prosecutor's conduct discussed above constituted ineffective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Because defendant raised this issue for the first time on appeal, our review is limited to errors apparent on the record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

While, as discussed above, it was improper for the prosecutor to ask defendant whether each witness against him "had it out for him," *Buckey*, 424 Mich at 16-18, defendant has not shown that the result of the proceedings would have been different had the prosecutor not asked such questions. As in *Buckey*, defendant dealt with the questions well. On one occasion, defendant responded, "I don't know if she has it out for me or not, or maybe she just wants to be involved with the case." On another occasion, when asked whether a witness "had it out for him," defendant responded by pointing out an inconsistency in the evidence. Furthermore, the jurors were instructed that it was their responsibility to determine the credibility of the witnesses For these reasons, and in light of the weight of the evidence against defendant, we are not convinced that the result of the proceedings would have been different had defense counsel objected to the prosecutor's remarks. Therefore, defendant has not shown that defense counsel's failure to object amounted to ineffective assistance of counsel. See *Johnson*, 451 Mich at 124.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's comments that allegedly shifted the burden of proof and denigrated defense counsel. However, because defendant has shown no misconduct by the prosecutor with respect to these remarks, he also has not shown that the failure to object to the remarks constituted ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to investigate and subpoena witnesses Shawn Walker and Tio Powell, who were passengers in defendant's vehicle at the time of the accident. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). The failure to call a witness amounts to ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *Id.* While defendant argues that defense counsel failed to investigate the witnesses, he does not support that argument with evidence. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999)

(holding that the "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.") The evidence does not establish that defense counsel's representation fell below an objective standard of reasonableness. Furthermore, defendant has not shown, by affidavit or otherwise, that the witnesses would have testified in his favor. Therefore, defendant has not shown a reasonable probability that, but for defense counsel's failure to investigate the witnesses, the result of the proceedings would have been different. Accordingly, defendant's ineffective assistance of counsel claim fails.

Finally, defendant argues that the sentencing court abused its discretion in exceeding the sentencing guidelines' recommended minimum sentence range without articulating a substantial and compelling reason for the departure. When defendant was sentenced, MCL 769.34(3) required a sentencing court to state on the record a substantial and compelling reason for a departure sentence. That requirement was struck down in *People v Lockridge*, 498 Mich 358, 391; 870 NW2d 502 (2015). Because a trial court is no longer required to justify a departure sentence with a substantial and compelling reason, we need not review defendant's argument. See *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (Docket No. 318329, issued October 22, 2015); slip op at 21 n 14. A departure sentence is now reviewed for reasonableness. *Lockridge*, 498 Mich at 392.

In *Steanhouse*, ___ Mich App at ___; slip op at 24, this Court held that a sentence that fulfills the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) and its progeny is a reasonable sentence under *Lockridge*. The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. The *Milbourn* Court held that "departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing," *id*. at 657, and "[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality," *id*. at 660. Previous considerations under the proportionality standard include (1) the seriousness of the offense, (2) factors not considered by the guidelines, including expressions of remorse, as well as the defendant's rehabilitation potential, and (3) factors that were inadequately considered by the guidelines in a particular case. *Steanhouse*, ___ Mich App at ___; slip op at 24.

Because neither *Lockridge* nor *Steanhouse* had been decided at the time of defendant's sentencing, the trial court's sentence was rendered in conformity with the "substantial and compelling reason" standard rather than the "reasonableness" standard. As this Court held in *Steanhouse*, "the trial court was unaware of and not expressly bound by a reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing." *Steanhouse*, ___ Mich App at ___; slip op at 25. Accordingly, we remand this matter to the trial court for implementation of the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), as discussed in *Steanhouse*, ___ Mich App at ___; slip op at 25, and explained in *Lockridge*, 498 Mich at 395-399. "[T]he purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error." *People v Stokes*, ___ Mich App ___; ___ NW2d ___ (Docket No. 321303, issued September 8, 2015); slip op at 11. Because resentencing could result in defendant receiving a more severe sentence, he must have an opportunity to avoid resentencing by promptly notifying the trial court that resentencing will not be sought. *Id*.; slip op at 11-12.

"If 'notification is not received in a timely manner,' the trial court shall continue with the *Crosby* remand procedure as explained in *Lockridge*." *Id*.; slip op at 12, quoting *Lockridge*, 498 Mich at 398.

We affirm, but remand for further sentencing proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher